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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 691

ASSOCIATED GAS DISTRIBUTORS, *Petitioners*

v.

AUSTRAL OIL COMPANY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AUSTRAL OIL COMPANY, ET AL., *Respondents* [1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Associated Gas Distributors, consisting of public utilities engaged in the distribution of natural gas,[2] petition for a writ of certiorari to review the judgment and opinion entered by the United States Court of Appeals for the Fifth Circuit on March 19, 1970, as supplemented by the Court's opinion denying petitions for rehearing entered June 16, 1970.

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[1] A list of additional respondents is set forth in Appendix B.

[2] A list of the Petitioners, all of whom participated in proceedings before the Commission and the court below as part of a larger group also designated Associated Gas Distributors is set forth in Appendix A.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit are not yet reported. The opinions of the court, which are lengthy, have been filed as appendices to the Petition for a Writ of Certiorari filed in No. 669, October Term 1970, *Municipal Distributor Group v. Federal Power Commission, et al.* The opinions and orders of the Federal Power Commission that were reviewed by the Court of Appeals are reported at 40 FPC 530 (1968) and 41 FPC 301 (1969).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 19, 1970. A timely petition for rehearing was denied on June 16, 1970, and this petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a reviewing court acting pursuant to § 19-(b) of the Natural Gas Act may affirm a rate order of the Federal Power Commission, and at the same time exercise general equity powers to authorize the Commission to make retrospective adjustments in the rates fixed by such order.

STATUTE INVOLVED

The statutory provision involved is Section 19(b) of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717r(b). The language of this Section is as follows:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commis-

sion in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which

if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of title 28.

STATEMENT OF THE CASE

This case, in terms of the number of parties, quantity of gas and consumer dollar interest involved, is the largest ever decided by the Federal Power Commission (FPC) under the Natural Gas Act. In it the FPC applied to the Southern Louisiana production area the same regulatory principles and methods approved by this Court in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). It fixed rates under Sections 4 and 5 of the Natural Gas Act and ordered sizable rate reductions and refunds from producers in Southern Louisiana. The order resolved long-standing rate controversies by determining, for the first time, just and reasonable rates for gas produced in this important production area. It is unnecessary to detail the nearly ten-year history of the case before the FPC, except to say that it closely paralleled the proceeding and orders affirmed by this Court in the *Permian Cases*.[3]

The history of the present case which is relevant to this Petition begins with the appeal of the FPC's orders to the Fifth Circuit in the spring of 1969 by a

[3] A comprehensive statement of the case is set forth in the petition filed by the Municipal Distributor Group in No. 669 and, to avoid repetition, we have limited our statement.

large group of producers, who contended that the rates fixed and numerous other provisions were too stringent. Similarly, appeals were taken by the Public Service Commission of the State of New York and a group of municipal distributors on the ground that the rates fixed by the FPC's orders were too high. Petitioners here, all of whom are gas distribution companies, intervened and joined the FPC in supporting its orders (which the FPC below characterized as "long overdue", 41 FPC at 308) taking the view that fourteen years of rate litigation were sufficient, and that the orders were reasonable and would provide much needed rate certainty.

On March 19, 1970 the Fifth Circuit affirmed the FPC in full. Taking notice of producers' arguments dealing with gas supply, the court however indicated that the FPC in the new *Southern Louisiana* area rate proceeding now pending before it (in Docket No. AR69-1) should pay special attention to the supply situation. The producers petitioned for rehearing and requested that the court remand the case for the taking of further evidence on the supply issue, arguing (in the court's words) that affirmance "would preclude the Commission from reexamining revenues from gas that has already been delivered."

In May the Fifth Circuit below directed the FPC to respond to these petitions and to answer two questions. The first was "whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed . . . if circumstances appearing since the entry of the order seem to make these actions advisable." The FPC answered that it has authority to modify its order, but only prospectively from the date of a subsequent FPC

order. It correctly stated that it has no retroactive ratemaking powers.

The Fifth Circuit also asked "whether this Court may, in the exercise of its equitable powers, affirm an Order of the Commission while preserving the authority of the Federal Power Commission to stay, modify, or rescind the Order if the circumstances seem to make these actions advisable." The FPC responded that, in the language of Section 19(b) of the Natural Gas Act, the court has the power "to affirm, modify or set aside such order in whole or in part" and that, on motions to adduce additional evidence, the court might direct the FPC to hold further hearings and make further fact findings. The FPC declined to comment on any equitable powers the court might have.

Finally, at the close of this response, without explanation, the FPC requested the Fifth Circuit to remand the case, with two commissioners dissenting.

On the basis of the petitions for rehearing and the response of the FPC, which were opposed by Petitioners, the Fifth Circuit on June 16, 1970 issued a per curiam opinion on rehearing, reaffirming its original opinion but at the same time authorizing the FPC to reopen any part of the rate order which the court was affirming.

Thus this case presents a crucial question as to whether a court of appeals can (1) affirm an order reached after a decade-long rate proceeding of the FPC, and (2) simultaneously allow the FPC to reopen that entire decade of litigation by authorizing it to "make retrospective as well as prospective adjustments in this case. . . ."

REASONS FOR GRANTING THE WRIT

1. The Decision on Rehearing Below Presents Serious Obstacles to Effective Regulation Under the Natural Gas Act

This Court held in its *First Phillips* decision[4] that producers of natural gas are "natural gas companies" within the meaning of the Natural Gas Act and subject to regulation thereunder. As such, their rates must be just and reasonable. The purpose of the Natural Gas Act, as stated in this Court's *CATCO* decision,[5] is to afford the consumer a complete, permanent and effective bond of protection from excessive rates and charges. The effect of the opinion on rehearing below is to prolong indefinitely the long overdue efforts to obtain effective regulation for the highly important Southern Louisiana production area[6] and to obtain a determination of just and reasonable rates for a period beginning in 1954.

The purport of this statement is best illustrated by the example of the very gas sales involved in the *CATCO* case which were reviewed by this Court. The contracts covering the *CATCO* sales were first entered into in 1956 and gas began to flow in 1958. These very sales, along with a great many others, were the subject of the FPC orders reviewed by the Fifth Circuit. Had the Fifth Circuit given its judgment of affirmance the finality which is required by Section 19(b) of the Natural Gas Act, the just and reasonable rates for the *CATCO* sales and numerous others (some dating as far back as 1954 and *First Phillips*) would at last have

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[4] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[5] *Atlantic Refining Co.* v. *Public Service Comm'n.*, 360 U.S. 378 (1959).

[6] Southern Louisiana presently provides one-third of the nation's gas production.

been determined, at least as to periods of time prior to the FPC order. However, as the opinion of the court below now stands, the FPC is given the discretion, irrespective of the court's affirmance and findings of reasonableness, to reopen the rates of the past sixteen years in Southern Louisiana and to reconsider them. Whether, after such further administrative proceedings (unlimited by any judicial guidance) the FPC reaffirms its present order, or raises or lowers it, is immaterial. The delay alone would deprive consumers of the protection to which they are entitled under the Natural Gas Act,[7] and the uncertainty created by such delay would be harmful to all segments of the natural gas industry that are required to function under the regulatory system prescribed by that Act.

2. The Opinion of the Fifth Circuit Affirming a Rate Order of the FPC and at the Same Time Authorizing It To Reopen Any Part of Its Order Presents Important Questions of Federal Law and Is in Conflict With Prior Decisions of This Court and Other Circuits

The opinions of the Fifth Circuit raise important questions concerning the statutory authority of the Federal Power Commission, as well as the power of a reviewing court to expand that authority of the Commission. Effective regulation of the natural gas industry requires resolution of these issues by this Court.

For the first time in the history of the Natural Gas Act a court of appeals, by both affirming the FPC and stating that the FPC could "reopen *any* part of its order" in effect authorized retroactive ratemaking.

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[7] This Court has recognized that refunds, while sometimes the consumer's only protection, are not adequate in and of themselves. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

There is no provision in the Natural Gas Act which empowers the FPC to make retroactive rate determinations. This Court has unequivocally declared that the FPC is empowered to establish rates prospectively only. In *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), the Court ruled the ". . . power to fix rates is limited to those 'to be thereafter observed and in force'." *Id.* at 618. The Court has recently reaffirmed this ruling in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968).

Since the authority of the FPC is entirely statutory, the powers withheld by Congress cannot be conferred upon the agency by courts through their equitable powers. In *Public Service Comm'n. of N. Y.* v. *FPC*, 257 F.2d 717 (CA 3 Cir. 1958), the Court of Appeals wrote that the Commission ". . . acts as an arm of Congress and only as Congress has directed it." Thus in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), this Court noted that it lacked jurisdiction to award reparation or equity powers authorizing the agency to award reparations. The Court held that there was ". . . no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose." *Id.* at 254. In an earlier case, *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), this Court also had ruled that courts cannot, "in the proper exercise of their judicial function," expand the agency powers beyond the scope of the statute. Therefore, in the instant case the Fifth Circuit was without authority to expand the statutory power of the FPC.

As noted, the Fifth Circuit attempted to make its judgment both a final one of affirmance of all the complex and numerous rate findings of the FPC below, and

at the same time a completely non-final judgment that gives the FPC indeterminate discretion to reopen any part of its prior rate order. Such a judgment not only contravenes the express language of Section 19(b) that a judgment "shall be final" but conflicts directly with the decision of the Eighth Circuit in *State Corp. Comm'n of Kansas* v. *FPC*, 215 F.2d 176 (1954).[8]

CONCLUSION

For the foregoing reasons it is urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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[8] See also *Arizona Grocery Co.* v. *Atchison, Topeka & Sante Fe R. Co.*, 284 U.S. 370 (1932); *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).